

The Honorable Marry Jo Heston
Chapter 13
Date of Hearing: March 29, 2021
Time of Hearing: 1:00 PM
Hearing Location: Telephonic
Response Due: March 22, 2021

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

IN RE:

BK Case No.: 19-42890-MJH

SARAH HOOVER,

Debtor.

Adv No. 20-04002 – MJH

SARAH HOOVER,

Plaintiff,

v.

Chapter: 13

PLAINTIFF'S OPPOSITION TO MOTION
FOR STAY PENDING APPEAL

QUALITY LOAN SERVICE CORPORATION
OF WASHINGTON, PHH MORTGAGE
SERVICES D/B/A PHH MORTGAGE
SERVICES, HSBC BANK USA, N.A, AS
TRUSTEE OF THE FIELDSTONE
MORTGAGE INVESTMENT TRUST,
SERIES 2006-2, NEW REZ, LLC, AND IH6
PROPERTY WASHINGTON, L.P. D/B/A
INVITATION HOMES,

Defendant.

PLAINTIFF'S OPPOSITON TO MOTION TO STAY PENDING
APPEAL - 1

HENRY & DeGRAAFF, P.S.
787 MAYNARD AVE S.
SEATTLE, WASHINGTON 98104
telephone (206) 330-0595
fax (206) 400-7609

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I. INTRODUCTION

This Court ruled that the PHH Defendants¹ violated the automatic stay by foreclosing on Ms. Hoover's home. PHH, who has not taken steps to comply with that Order, is so confident in its future appellate success that it is **"willing to agree not to evict Plaintiff" from her own home in the meantime.** ECF.#95 at 13. It is unclear whether PHH – who remains under court order to unwind the foreclosure – actually believes that it has the power to evict Ms. Hoover from her own home.

In any event, PHH's motion to stay should be denied.

First, PHH has no appeal as of right. This Court granted partial summary judgment in favor of Ms. Hoover as to liability as to the PHH Defendants, but all other issues remain for trial. The issue raised by the Defendants' motion to annul the stay was not a "discrete dispute" that was unconnected from this case, but rather sought adjudication of the wholly-intertwined issue about the applicability of the automatic stay. The purpose of requiring appeals from "final orders" is to avoid piecemeal appeals, which is precisely what would occur here, as PHH would almost certainly appeal from any outcome at trial in this case.

Second, PHH cannot meet any of the factors required for a permissive interlocutory appeal. As demonstrated by this Court's ruling on PHH's motion for reconsideration, PHH is not likely to prevail on the merits. PHH does spend a significant portion of its brief arguing that it would be "irreparably harmed" without an immediate appeal, but submits no evidence beyond generalized complaining about litigation costs, most of which self-inflicted.²

Contrary to PHH's assertions, Plaintiff Sarah Hoover would suffer harm from staying this case. Ms. Hoover testifies that because she no longer controls what happens to her home, she suffers anything from annoyances and financial inconveniences (as she cannot place most

¹ PHH Mortgage Corporation D/B/A PHH Mortgage Services, NewRez, LLC, and HSBC Bank USA, N.A., as Trustee of the Fieldstone Mortgage Investment Trust, Series 2006-2 (collectively, the "PHH Defendants" or "PHH")

² In remarkably circular logic, PHH claims that it requires permission to appeal because of the expense in dealing with this case *while it is busy pursuing an appeal*. Dkt. #95 at lines 1-2.

1 utilities in her name, she is prevented from restoring her garbage service to its prior level, and as
2 the bills are not in her name, she has no idea how much she will be charged in the future) to
3 dilemmas over what to do about her daughter's unsafe school (as she cannot move to another
4 school district). *See* Declaration of Sarah Hoover in Support of Opposition ("Hoover Opp.
5 Dec."), at ¶ 10-13, 16-19. Ms. Hoover is also deprived of the ability to make choices for her
6 family and otherwise assert the same self-determination that other homeowners enjoy. *Id.*, at 5-
7 9, 14-15. While Ms. Hoover does recognize that she still has a roof over her head, it does not
8 detract from the difficulties that she and her family face from this entire situation. *Id.*, at 20-21.
9 Thus, she would prefer that this case be resolved by way of a final order after trial, at which
10 point Defendants can appeal as of right.

11 At the end of this brief, Plaintiff also addresses the Court's inquiry from the last status
12 conference, which concerned limited discovery on the topic of punitive damages.

13 Plaintiff respectfully requests that this Court deny PHH's motion to stay this case
14 pending an appeal.

15 II. LEGAL ARGUMENT

16 A. The Court's Ruling is Not a Final Order

17 Defendant asserts that issues in this case can be addressed piecemeal on appeal, that
18 portions of this Court's order allow an immediate appeal as of right, and, for those rulings that
19 are interlocutory, that this Court should also allow appeal.

20 The notion that an appellate court can parse the order into discrete parts is problematic;
21 this case involves one single adversary proceeding in a bankruptcy case that has been dismissed,
22 leaving no estate or other creditors with any claim to matters in this proceeding. Thus, this case
23 is far more akin to federal litigation where an order as to liability alone (but not damages) is not
24 final. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744 (1976).

25 Even without viewing this case as analogous to a federal civil matter, an appeal would
26 still be improper, as there are no "discrete disputes" unconnected to the issues raised in this
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adversary proceeding. Pursuant to 28 U.S.C. § 158(a), a bankruptcy court's order is final and immediately appealable if it disposes of discrete disputes within a bankruptcy case. *Bullard v. Blue Hills*, 75 U.S. 496, 501 (2015). To be final, an order terminates a "procedural unit separate from the remaining case" or "conclusively resolve[s] [a party's] entitlement to the requested relief." *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 140 S. Ct. 582, 591 (2020). Since the annulment motion was consolidated into the Adversary Proceeding, Bankr. No.19-42890, ECF No. 44, and Ms. Hoover's bankruptcy case is closed, a ruling on the annulment motion does not resolve a "discrete dispute" or "procedural unit separate from the remaining case," and this Court did not "conclusively resolve [Ms. Hoover's] entitlement to requested relief." *Id.* Though this Court's order established liability as to Ms. Hoover's affirmative claims, it did not yet address damages and did not provide any finality concerning the ultimate resolution of Ms. Hoover's property. While the Court took the more pragmatic approach of asking the parties to work together on the latter issue, the Defendant concedes that this "may require judicial assistance and is not a process free of legal dispute." ECF No. 95 at 4. In addition, the determination as to whether punitive damages is appropriate is part of the same "discrete proceeding," as § 362(k)(1) authorizes such an award. 11 U.S.C. § 362(k)(1); *In re Marino*, 949 F.3d 483, 488 (9th Cir. 2020) (An order was not final where a damage award had not been finalized). Lastly, Ms. Hoover observes that it is settled law that any foreclosure sale held in violation of § 362(a) is void. Thus, any argument that the court's order would "depriv[e] both Defendants and IH6 of a property interest" is not only an incorrect statement of law and fact but using such an argument as a reason requiring an immediate is anathema to the very tenet of the automatic stay. *See In re Achterberg*, 573 B.R. 819, 830 (Bankr. E.D. Cal. 2017) (the automatic stay requires a creditor to maintain the *status quo ante* and to remediate acts taken in ignorance of the stay.).

B. A Stay Is Not Warranted

Defendant's request under Fed. R. Bankr. P. 8007(a)(1) and (e) is unwarranted.

1 A stay pending appeal is an exercise of judicial discretion, dependent on the
2 circumstances of a particular case. *See Nken v. Holder*, 556 U.S. 418, 433 (2009). To determine
3 whether a stay is appropriate, courts consider four factors: (1) whether the stay applicant has
4 made a strong showing that the appeal is likely to succeed on the merits, (2) whether the
5 applicant will be irreparably harmed absent a stay, (3) whether issuance of the stay will
6 substantially injure the other parties interested in the proceeding, and (4) where the public
7 interest lies. *Nken*, 556 U.S. at 434. The movant must make a certain threshold showing on each
8 factor and then convince the court the balance of the four factors weighs in favor of issuing a
9 stay. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

10 The first two factors are the most critical. *Nken*, 556 U.S. at 434. A failure on any one
11 factor requires the court to deny the application for a stay. *In re Swartout*, 554 B.R. 474, 476
12 (E.D. Cal. Bankr. 2016). If an applicant satisfies the first two factors, the inquiry then calls for
13 assessing the harm to the opposing party and weighing the public interest. *Nken*, 556 U.S. at
14 435. Here, the scales weigh decisively against a stay and the motion should be denied.

15 **C. First Factor: Likelihood of Success on the Merits**

16 First, the moving party “must make a strong showing that it would succeed on the merits
17 on appeal.” *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012). However, the court does not
18 have to change its mind; it only has to find there is a “substantial case for relief on the merits”
19 and that the showing of success is more than a mere possibility of relief. *Id.*; *see also Leiva-*
20 *Perez*, 640 F.3d at 964-68.

21 While Plaintiff has already briefed the issues in the case regarding the so-called
22 spendthrift trust, she need not expand on it here. *See* ECF.No. 42 at pg. 9. Defendant’s insistence
23 on the validity of some spendthrift trust argument here without raising any new legal arguments
24 is emblematic of the low merit of their appeal – this is a black letter law issue determined by
25 state law. Despite this, Defendants grasp at straws by citing the laws of OTHER states as some
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1 sort of basis to overturn this court's decision based on Washington State law, which happens to
2 be the law that applies here. As a result, Defendants' appeal has a low probability of succeeding.

3 It is undisputed that the Ninth Circuit's definition of "willfulness" under 11 U.S.C. §
4 362(k)(1) does not require specific intent to violate the automatic stay. *Goichman v. Bloom (In re*
5 *Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989). Under the statute, damages are provided upon a
6 finding that the defendant knew of the automatic stay and that their actions done in violation of
7 the stay were intentional. *Id.* Subjective good faith about whether it had a right to the property is
8 not relevant to whether the act was "willful" or whether compensatory damages must be
9 awarded. *Id.*

10 Although not argued in the summary judgment proceedings, on reconsideration, PHH
11 attempts to raise a novel argument under *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1804, 204 L. Ed.
12 2d 129 (2019), that the willfulness standard under 11 U.S.C. § 362(k)(1) used by the Ninth
13 circuit is an extreme one and that if an entity acts with subjective good faith belief that it should
14 not be subject to sanctions. ECF No. 94 at 10. In reviewing PHH's motion for reconsideration,
15 the court already eschewed reliance on *In re Moo Jeong*, 2020 WL 1277575, at *3 (9th Cir. BAP
16 Mar. 16, 2020), a non-binding case decided in the context of a Trustee who claimed a violation
17 of the automatic stay under the bankruptcy court's contempt provisions of 11 U.S.C. § 105(a)
18 where the court applied the "no fair ground of doubt" standard to automatic stay violations, as
19 inapplicable and distinguishable as the Moo Jeong parties did not object to the standards used in
20 that case and the cited Ninth Circuit authority addressed a bankruptcy court's equitable powers
21 under § 105(a), rather than § 362(k)(1) for willful automatic stay violations. ECF No. 99 at 4, n.
22 5.

23 Even if a court applied, for the first time, the *Taggart* standard for contempt proceedings
24 to willful stay violations under § 362(k)(1), this argument would also fail. First, PHH had notice
25 of Ms. Hoover's bankruptcy in its system and it cannot claim its internal disorder to excuse it
26 from violating the stay. *In re Campion*, 294 B.R. 313, 317 (B.A.P. 9th Cir. 2003). ECF No. 99 at
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1 6. Despite PHH's ill-conceived attempt to bootstrap the fair ground of doubt standard from
2 *Taggart* onto the automatic stay, 11 U.S.C. § 362(k)(1) does not support such a reading. There is
3 no relief available to debtors under § 105 for willful stay violations. Individual debtors have a
4 specific remedy available under § 362(k), so it would not be "necessary or appropriate" for the
5 bankruptcy court to enforce the stay by imposing contempt sanctions or to rely on any
6 interpretation of a willfulness standard under the catch-all authority granted by § 105(a). *See In*
7 *re Snowden*, 769 F.3d 651, 661 (9th Cir.2014) (citing *In re Roman*, 283 B.R. 1, 14–15 (9th Cir.
8 BAP 2002)).

9 **D. Second Factor: Irreparable Harm**

10 PHH claims – without submission of evidence – it will encounter irreparable harm in
11 complying with this Court's order to unwind the foreclosure sale. However, IH6 (the party
12 actually holding the Property and who is also subject to the court's reconveyance order) is
13 apparently not aggrieved enough to join in on this appeal. ECF No. 90 at 14. Additionally, the
14 equities and interests of the parties here are not equal. PHH and IH6 are corporate entities while
15 Ms. Hoover are an individual who is living in a house with her six family members.

16 Aside from what it believes to be protracted litigation costs, PHH cannot prove
17 irreparable harm if there is no stay, and litigation costs generally do not qualify as irreparable
18 harm. *Marino*, 949 F.3d at 488. Certainly, considering PHH's weak legal arguments, the balance
19 of equities weighs on judicial efficiency and lack of piecemeal litigation gained by proceeding to
20 trial on damages, as the parties would almost certainly climb back up the appellate ladder, which
21 is disfavored. *See Bullard*, 135 S. Ct. at 1693 (explaining that the "rule of finality" exists to
22 avoid "climb[s] up the appellate ladder and slide[s] down the chute" and the "delays and
23 inefficiencies" that result).

24 Additionally, any perceived harm to Defendants is purely financial. While minor
25 financial harm to a major corporation is something which still must be weighed, any such harm
26 is at least defrayed by the security of (a) Ms. Hoover paying \$2,200 per month into her attorney's
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1 trust account, and (b) the surplus funds of \$167,407.96 which remain in this court's registry.
2 Hoover Opp. Dec., at ¶ 4; Bankr. No.19-42890, ECF No. 15. However, the parties discussed that
3 compliance with the court's order could be remedied by reconveyance of the property back to
4 Ms. Hoover via stipulated order with potential provisions to protect the parties should the court
5 grant a stay pending appeal. Declaration of Christina L Henry in Support of Opposition ("Henry
6 Opp. Dec."), at ¶ 4-5, Ex C and D. Although initiated by the Plaintiff nearly a month earlier, IH6
7 chose not to participate in any discussions, and PHH, responded by filing this motion for stay,
8 *Id.*, at ¶ 2-3, Ex. A and B. During the discussions, aside from QLS raising ways to ameliorate
9 any potential harm to the positions of PHH and IH6, they have raised any issues regarding the
10 need for potential protections or expressed any desire to comply with the court's order to retore
11 title due to the stay violation in the event an appeal is allowed. Thus, the court should reject
12 PHH's concerns in whole cloth.

13 **E. Fourth Factor: Injury to Ms. Hoover caused by a stay**

14 Unlike PHH, a corporation whose existence will not be imperiled by any outcome in this
15 case, a stay would cause far more grievous injury to Ms. Hoover.

16 Though Ms. Hoover and her family still live in the property – for now – she has been
17 deprived of the fundamental attributes that homeowners share, such as certainty and security for
18 her future. While a homeowner has the right to move, make improvements, and generally make
19 her own decisions for her and her family's future, Ms. Hoover is bound to the property until the
20 conclusion of this litigation. *See generally*, Hoover Opp. Dec. Ms. Hoover's daughter recently
21 began high school at a school known for a drug problem, and Ms. Hoover worries for her
22 daughter's safety. Hoover Opp. Dec., at ¶ 18. At present, Ms. Hoover cannot simply pack up
23 and move to another school district, as she could not afford to continue making payments on this
24 home and another one (assuming she could even qualify for a loan or a rental). Again, had PHH
25 not violated the automatic stay, Ms. Hoover would have none of these problems and would have
26 the freedom of self-determination that most homeowners take for granted.

1 In the interest of judicial economy, Ms. Hoover will simply direct the Court to her
2 declaration, which describes the impact that continuing this litigation will have on her life and
3 her family's lives. *See generally*, Hoover Opp. Dec. In any event, given the egregious stay
4 violations found by this court, PHH's claim that it will "agree to not evict Plaintiff" rings rather
5 hollow and provides no reassurance at all to Ms. Hoover and her family. ECF No. 95 at 11.
6 While real estate may be a fungible asset for PHH, the home in which Ms. Hoover raised her
7 children is not something she would be happy to allow a third party to hold onto for "safe
8 keeping."

9 Lastly, in blatantly inaccurate and misleading statements, PHH claims that Ms. Hoover's
10 counsel was unwilling to discuss any issues as to why Ms. Hoover would be prejudiced by a
11 stay, while still refusing to acknowledge that their actions are in violation of the stay that was in
12 place when the house was sold in foreclosure. Henry Opp. Dec., at ¶ 10.

13 **F. Fourth Factor: Public Interest**

14 Lastly, aside from the Defendant's focus on preserving the status quo and the
15 conservation of judicial resources, there is no basis in fact that a stay is in the public interest.
16 Courts consider whether the public interest will be served by granting a stay pending appeal.
17 *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "This factor calls for the court . . . to consider
18 and balance the goal of efficient case administration and the right to a meaningful review on
19 appeal." *In re Taub*, Case No. 08-44210, 2010 WL 3911360, at *9 (Bankr. E.D.N.Y. Oct. 1,
20 2010). Here, PHH fails to address the fact that a violation of the stay erodes the very nature of
21 bankruptcy and the status quo is what needs to be restored, with the property back in Ms.
22 Hoover's control. Accordingly, the public interest favors the court denying a stay pending
23 appeal.

24 **III. DISCOVERY RE: PUNITIVE DAMAGES**

25 At the most recent status conference in this matter, this Court indicated an inclination to
26 grant Plaintiff's oral motion (made at the February 18, 2021 status conference) for a very limited
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1 re-opening of discovery as to punitive damages, and requested more information from Plaintiff,
2 which is therefore being provided by way of this brief.

3 As this Court is aware, Defendants have taken issue with nearly every facet of Plaintiff's
4 case, and the parties extensively litigated simple fundamentals, such as whether Ms. Hoover's
5 home was even property of the estate. Defendants not only vigorously opposed Ms. Hoover's
6 motion for summary judgment, but also joined in the filing of (a somewhat duplicative) motion
7 to annul the stay, confusingly, without conceding that the automatic stay even applied.

8 On this backdrop, prior to any ruling from this Court as to the applicability of the
9 automatic stay, Plaintiff did not need to further complicate the case by issuing discovery requests
10 concerning punitive damages, correctly anticipating that Defendant PHH would oppose any and
11 all such discovery. When the parties were engaged in discovery, Plaintiff was, of course,
12 required to be mindful of the standards contained in Fed. R. Civ. P. 26(d)(1), which limits
13 discovery to matters which are "proportional to the needs of the case" and "whether the burden
14 or expense of the proposed discovery outweighs its likely benefit." At the time when the parties
15 were litigating whether the automatic stay even applied to this case, even Ms. Hoover would
16 have had to agree that issuing discovery requests which related exclusively to a potential
17 assessment of punitive damages would not have been proportional to the needs of the case at that
18 time.

19 Now that a damages trial is upcoming, a narrowly-focused round of discovery as to
20 Defendant PHH's finances, policies and procedures and pattern and practice is undeniably
21 appropriate. Plaintiff therefore raised this issue as soon as possible by making an oral motion at
22 the February 18, 2021 status conference, and this Court indicated preliminary approval, subject
23 to negotiation by the parties as to the scope and terms of such discovery. To save time and
24 expense, Ms. Hoover sent the proposed discovery requests and deposition notice to PHH on
25 February 23, 2021, with an urgent request that the parties confer. Henry Opp. Dec., at ¶ 6-7, Ex.
26 E-K.

PHH declined to confer, instead focusing on its own litany of filings (including the instant motion), and only even acknowledged receipt of the proposed discovery on March 10, 2021. Henry Opp. Dec., at ¶ 8, Ex. L. Thereafter, on March 15, 2021, PHH and the Plaintiff's counsels later held a discovery conference on the motion for stay and punitive damages but they did not resolve any issues. *Id.*, at 9. It would appear that PHH was hoping that it could delay even addressing the discovery at issue for a long enough period that, perhaps, it could force a delay of trial.

A. Applicable law

There is no question that discovery as to a defendant's finances and net worth are relevant for purposes of punitive damage calculations. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981). Often, a defendant will balk at responding to discovery concerning punitive damages if liability has not been established, as it may seem premature. Indeed, PHH's predecessor entity (Ocwen) has fought such discovery on similar grounds. *See Covarrubias v. Ocwen Loan Servicing, LLC*, 2018 WL 5914240, at *2 (C.D. Cal. June 21, 2018). Trial courts, of course, have broad discretion in pretrial and scheduling matters, including whether to permit additional discovery. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992); *Hunt v. Orange Cnty.*, 672 F.3d 606, 616 (9th Cir. 2012) (explaining that District courts have broad discretion to manage discovery).

The Ninth Circuit has not weighed in on the issue of when discovery into punitive damages is allowed. Some courts do permit discovery into punitive damages early in the case, but it remains fact-specific. *See Atayde v. Napa State Hosp.*, 2020 WL 605868, at *3 (E.D. Cal. Feb. 7, 2020) (citing cases); *cf. Zielke v. Vision Hosp. Grp., Inc.*, 2015 WL 9876950, at *2 (E.D. Tenn. Nov. 3, 2015) (some courts permit discovery upon a prima facie evidentiary showing, "while other courts delay discovery altogether on punitive damages until after dispositive motions have been decided"). Other jurisdictions outright prohibit punitive damages discovery

1 until liability is established. *See Specialty Surplus Ins. Co. v. Second Chance, Inc.*, 2006 WL
2 8454865, at *1 (W.D. Wash. May 23, 2006) (applying New York law).

3 Here, had Ms. Hoover sought discovery concerning Defendants' finances for purposes of
4 punitive damages, it would have been a very poor use of all parties' resources, and would have
5 been unnecessary for some parties, such as QLS (as the Court found no willful violation by
6 QLS). Such discovery would have ensnared the parties in discovery disputes and, more
7 importantly, probably would not have met the required standards under Rule 26 (that discovery
8 be proportionate to the needs of the case).

9 Now, however, discovery concerning PHH's finances, policies and procedures and
10 pattern and practice – on a limited basis for a limited period of time – is particularly appropriate
11 and relevant. This is a matter squarely within this Court's discretion, and Plaintiff respectfully
12 requests that this Court permit Plaintiff to issue the interrogatories and requests for production
13 concerning Defendants' financial condition and net worth, and that PHH attend a deposition on
14 this topic as well.

15 IV. CONCLUSION

16 WHEREFORE, PHH has failed to satisfy the factors for granting a stay pending appeal
17 and for the reasons set herein and in the interests of justice, Ms. Hoover respectfully requests that
18 this court deny the request for a stay pending the appeal.

19 DATED this 22nd day of March, 2021.

20 HENRY & DEGRAFF, P.S.

21 ANDERSON SANTIAGO, PLLC

22 By: /s/Christina L Henry
23 Christina L Henry, WSBA #31273
24 Attorneys for Plaintiff
25 787 Maynard Ave S.
26 Seattle, WA 98104
27 Tel# 206-330-0595
chenry@hdm-legal.com

By: /s/ Jason Anderson
Jason Anderson, WSBA #38014
Attorneys for Plaintiff
787 Maynard Ave S.
Seattle, WA 98104
Tel# 206-330-0595
jason@alkc.net